MEDICAL TESTIMONY AND THE MEDICAL WITNESS

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IN preparing this brief talk on 'Medical testimony and the medical witness', I could not avoid recalling the prevalent view that the court is indeed the best friend of honest men. I find it difficult to reconcile this belief with the other view that 'The honest witness is the lawyer's easy prey'. It is probably this element of contrast, and the adoption of surprise tactics perhaps, that renders the box between bench and bar so uncomfortably restrictive. It is also perhaps a lack of adaptation mingled with a touch of unpreparedness that leads to such a poor show before a full and critical gallery. At times too, it is made pretty obvious that the important role the medical witness was to play had to be taken up only through force of circumstance, seemingly a last minute imposition, rather than out of a desire for the fulfilment of an onerous responsibility.

It is superfluous for me to attempt to justify the necessity of the Courts to seek the aid of medical evidence and expertise in order to mete out justice clearly and possibly faultlessly. The Courts have had recourse to expert evidence, especially on medical matters, even centuries before Christ, and certainly the oldest known document which deals specifically with legal medicine is the manual Hsi Yuan Lu (Instructions to Coroners) first published in China in 1250 A.D. In the course of time, and with the foundations being well laid in Europe by Paolo Zacchia in the 16th century forensic medicine rapidly evolved as a distinct subject of study. The advances achieved in medicine and science were readily adapted with great profit to forensic problems so that modern legal medicine has come to play a very important role in Courts. This is so not only in Criminal Courts but also in Civil and Ecclesiastical.

In common law countries, but no less in Malta under our legal system, medical practitioners are often requested to present medical facts related to a case before the Courts. Such evidence, in general, may only be obtained in its entirety and in its specific context from the medical practitioner responsible for the care and treatment of the subject to whom such evidence relates. The problem of professional secrecy involved in revealing certain medical

data is not considered here. I wish to discuss briefly the element of uncertainty with which the medical witness may be faced. There is no doubt that the Courts in ascertaining facts concerning the the medical status of an individual will virtually consider such evidence as that of an ordinary witness, although the establishment of these facts requires more than common knowledge and ordinary experience. Thus the relating of such facts arising solely from the practitioner's professional activity should place him, I submit, in a class apart from that of the ordinary witness. This immediately raises a difficulty in so far as much of the medical information established in the course of medical practice, is by and large, also a matter of medical opinion. Thus, far too often, it is difficult even for the doctor himself to distinguish sharply where matters of fact end and where his sound opinion begins. It may therefore, be even more difficult for the presiding judge or magistrate to draw the line of demarcation. This places the medical witness in the uncertain position that at one moment he is just an ordinary witness, and an expert witness the moment he answers the next question. Medical practitioners often enough fail to appreciate their legal position in the witness box, so that their testimony becomes confused and loses much of its evidential value.

If the medical witness wishes to fulfil his duties honestly and with the dignity expected of him by reason of his profession, he must then appreciate what is the essence of good testimony. There is no doubt that it should reflect the high degree of care he employed at the time he attended his patient but also the degree of care with which he prepared his evidence. He must be fully aware of the facts without which it would be impossible to reason soundly and reach the valid and correct conclusions in which the Court is really interested. Sec. 649(2) of our Criminal Code lays down that it is 'the facts and circumstances on which the conclusions of the experts are based' which should be submitted in the report. The mere submission of a report, oral or written, does not terminate his responsibility as a professional witness. It is essential that simple, clear and careful explanations of the various factors on which opinions and conclusions have been based should be presented by the expert as required by the Courts. This may often call for an element of spontaneity and inspiration which leaves its indelible impact particularly on a jury. In the face of stiff cross examination, intelligent anticipation is an important requisite while utilising every opportunity offered to drive home the significant

and salient points on the matters in question. If the facts have been examined cursorily without proper study and evaluation, it takes little effort on the part of the defence or prosecution to expose the incompetence or unreliability of the witness.

Doctors are generally required to give their professional or expert evidence particularly in the Criminal Courts under our system as independent witnesses. This frees the witness from having to go the rounds to sell his wares of expert testimony as often happens in Common Law countries under the adversary system. He is thus at an advantage in so far as he then necessarily makes truth his objective and does not take a partisan attitude. Hence honesty and objectivity ought not to be difficult to achieve. He should however, not go beyond the implications of the facts which he is in a position to prove, or beyond an impartial opinion based on them. The innocence or guilt of an accused has nothing to do with him in his capacity as a witness, and any bias shown in either direction will serve to weaken the force and value of his evidence. As Judge Lord Campbell said at the trial of William Parker in 1856: 'It is indispensable to the administration of justice that a witness, an expert witness, should not be turned into an advocate, nor an advocate into a witness.'

Honesty cannot be dissociated from objectivity. Both should be revealed unmistakeably in the expert's approach to the exploration of the available facts as well as in their interpretation Medicine, we all agree, is not an exact science. This makes it more than essential that the medical witness should present a fair appraisal of his observations. It then becomes incumbent upon him to present a frank statement of the limits of accuracy within which he is speaking, and to indicate, whether he is asked to do so or not, what his evidence does not prove or suggest as likely. This implies that the expert witness should be capable of discriminating between what in his evidence is merely evidential from what is probative and therefore based on unassailable facts beyond any scientific doubt. It is essential that certain established facts which are not absolutely relevant should not be unduly emphasised so that the points at issue remain clearly understandable by anyone who learns them even at second hand. The purpose and attitude should be such that they leave no shades of doubt as to the unimpeachable ethical conduct of the medical witness in the stand. The admittance of doubt or of possibilities in the light of new established facts does not detract from the competence of the witness, but

serves to add credit to his impartial conduct, and to his credibility.

It may be useful at this juncture to remark that at times even when a medical witness achieves this ideal in medical expertise, personal pride may be hurt. He may end up disillusioned because even though his testimony was unassailable and unimpeachable it may be relegated to a mere few sheets of transcription in a voluminous document. It must be appreciated that medical, scientific or expert evidence need not of necessity prove of paramount importance as the proceedings evolve. Even circumstantial evidence in some cases may dominate the case for the defence or prove incriminating, or may even go so far as to contradict unequivocally the expert evidence. This is acceptable because the Court is bound by Sec. 558 of the Code of Organisation and Civil Procedure wherein it is laid down that 'in all cases the Court shall require the best evidence that the party may be able to produce.' And further, Sec. 652 of the Criminal Code explicity lays down that 'those who are to judge are not bound to abide by the conclusions of the experts against their own convictions.' This possibility should not detract from the merit which such evidence has in itself, and in turn may in time prove useful for guidance in juridical decisions. Comprehensiveness without over elaboration and outright objectivity are the hallmark of good expert evidence. It is rewarding to realize that scientific evidence, including medical evidence, even though falling short of proof may be conclusive when it is added to the other elements of the case.

Having set the ideal scene both for the medical witness and expertise, I now venture to examine the workings of medical evidence in practice in Malta.

Without any reservation, both professions, medical and legal, agree that although both aim at protecting the interests of an individual, a human being, each profession distinguishes itself by referring to the same individual in diverging terms: the first as the patient, the second as the client. In proferring their services they find it difficult to discard an approach that is essentially predetermined by their training and which neglects to a large extent this basic fact. There exists a conflict of purpose as well as of methods that often divides the two professions both in and outside the courtroom. A case might be made for establishing a better inter-disciplinary relationship through joint meetings between the two professions to exchange ideas and discuss problems of com-

mon interest. It is, to my mind, only through such a dialogue that we may begin to understand each others' attitudes and manner of speaking and spare each other unhealthy and frustrating criticism. Each profession stands to gain through such amicable exchanges, and thereby help to serve patient and client better, and in the best interests of justice.

The medical witness is by and large a stranger in the court-room where formality and publicity pervade the air. For him this is very different from the private and casual atmosphere that prevails in the ward or the clinic. Facing his patient he may have to extemporize to meet an emergency and expects a quick response, very different from what he can prudently do in or expect of the Courts. Yet he has to resign himself to his inescapable responsibilities which he may fail to recognise or to accept. There is much to be said for fulfilling these responsibilities in much the very same way that a doctor is expected to meet his medical ones. Undoubtedly such an attitude considerably lessens the burden.

It is with some regret that I register what I consider to be the prevailing failings that antagonize the medical witness. Firstly, the first contact is very often with a uniformed police officer. Police officers tend to place the force's interests well before those of the patient whose safety is the primary concern of the attending doctor. The doctor, anxious to treat his patient, may be battling to save his life, cannot afford the luxury of completing formalities at the same time. This order of priorities sets the scene for a clash of personalities that may go beyond a harsh exchange. I have no hesitation in admitting that sometimes this is attributable to a lack of understanding, a lack of communication, and possibly lack of mutual respect. These difficulties can only be overcome through proper education in recognizing better each other's responsibilities.

A more common cause which increased the reluctance of doctors to give evidence is the fact that a summons to the court is given only short time before the hearing is due and the information given in the summons is too brief and uninformative which prevents the witness from identifying the case and preparing his evidence. Few doctors realize that they are legally entitled not to answer the summons, except in urgent cases, unless the summons is served 'at least two working days previous to the day fixed for his appearance' – Sec. 373 Code of Criminal Procedure. This two day notice is too short and very disturbing for doctors, particularly when they

are now very frequently required to appear in court. Lateness in appearing or failure to attend at all have brought on several doctors, particularly on junior doctors in hospital, the rough treatment that reflects a lack of appreciation on the part of the Courts of the doctors' position, duties and commitments. The Ministerial circular recommending that doctors be summoned after 10.30 a.m. has helped but only insignificantly to solve the problem. Casualty officers admitting a victim are usually sub-poenoed to give evidence relating to the diagnosis, treatment and final assessment even though they have been responsible solely for the patient's admission. This is discovered at the time he is called to present his evidence and when he has to admit that he can neither provide the information nor express the opinions required by the Court. The apportioning of medico-legal responsibilities is far from being clearly defined. This is a matter of concern and demands urgent attention both from the legal as well as from the hospital administrative aspect. I shall refrain from entering into details but undoubtedly responsibility in hospital cannot be at all times equated with legal responsibility. A quick resolution of this problem would benefit not only doctors, but also the hospital administration and would certainly prove time-saving and less disruptive to Court proceedings.

Unnecessary waiting because of postponements of hearings is an annoying experience for doctors who may be hard pressed to cope with an urgent workload in hospital or in their practice. Many such delays can be avoided if there is intelligent sorting out of cases and if medical witnesses are summoned only when their presence is really necessary. Doctors understandably resent 'the Courts display of the law's delay'.

I fully share the general feeling of futility that many medical witnesses experience when their attendance amounts to a sheer formality, such as when they are required to identify a document bearing their signature when no party is contesting its authenticity. I suggest that in such cases ways and means be found whereby such confirmation may be dispensed with as Sec. 642(2) provides for in some respect. It is understood that any party retains the right to call the doctor concemed as a witness for any good reason. This in fact may amount to amending the law to provide for such agreed evidence, as has been done in England by the enactment of the Criminal Justice Act 1967.

The availability to the defence of all the evidence collected by the prosecution at the compilation of evidence in our Criminal

Courts helps considerably to dispense with the need for the appearance of all the witnesses at the trial. Unless the presence of witnesses is essential and unless their absence interferes with the legal rights of the accused or jeopardises the case for the prosecution, then medical witnesses ought not, I submit, to be summoned. If however, their evidence is necessary either to confirm or to elucidate some points in the evidence submitted, or if cross examination is planned, they could then be so heard at a pre-appointed stage of the trial. I am pleased to note that a change in this direction has occurred in recent years.

The Criminal Code (Sub-Title II) speaks of experts and regulates the conduct of expertise including expert medical evidence. It appears however, that the provisions of Sec. 646 Sub. (2) whereby the Minister for Justice is empowered to create panels of experts from amongst whom the Courts must choose, are not availed of. I submit that failure to provide according to this section is not conducive to the raising of the standard of medical expertise, and may constitute a risk of miscarriage of justice. It is rather disconcerting to note that most lawyers fail to understand that even a specialist in one field of medicine cannot be considered as equally expert in another speciality. Neither should the misconception persist that a successful practising doctor can speak with authority on surgical problems or is adequately equipped to deal with complicated forensic cases. It is utterly ludicrous for instance, to believe that an analyst trained in food analysis or a chemist expert in the synthesis of drugs, be expected to be able to cope with a forensic science problem involving expertise in trace evidence such as that yielded by paints, fibres or glass fragments. Admittedly, given enough time to study a particular problem there exist well qualified specialists who can do much to help the Courts or the Police in their investigation. But in many cases delay in completing an analysis may be crucial. It is, I suggest, high time that an organised effort were made to recruit qualified and willing experts in various fields, to elicit their interest and to urge them to maintain their activities with a view to equipping themselves to be able to tackle the forensic problems that may be entrusted to them.

The amount of remuneration, if any, which is stintingly granted for any expertise is not conducive to attract the best and therefore the most busy of specialists. The recollection of the Biblical philosophy that the labourer in the vineyard is worthy of his hire may not be out of place. It is understandable that the services of the

best experts are often lost because of the lack of this proper acknowledgement. Bureaucracy should not be allowed to jeopardise the proper and efficient administration of justice.

The purpose of medicine is to maintain the patient in the best of health, to overcome the disease or injury, and to prolong his life span. The purpose of law is to maintain peace and order in the community, to respect the human personality through human rights, and to provide equality of opportunity. To achieve these purposes, medicine emerges from the laboratory by the scientific process: law emerges from the community by the process of experience. 'People follow medicine, law follows people.' Both professions are thus committed to safeguard the ultimate and common purpose – humanity.

If at any stage of this brief review I have been instructive, it is merely incidental; If I have been constructive it is quite essential, and if I have been provocative, it is absolutely intentional.

SOME GENERAL CONSIDERATIONS ON THE DEATH AND DONATION DUTY ACT 1973

CARMELO MIFSUD BONNICI

ON 1st January 1974, the Death and Donation Duty Act, 1973 came into force. Its stated object is 'to provide, in place of the Succession and Donation Duties Ordinance, for the imposition of a duty on property passing on death or transferred gratuitously by way of *inter vivos* disposition, and for the collection thereof'.

The Act is based on the draft law which was prepared by a Commission set up in September 1971. The Commission was chaired by Mr. Justice Agostino Gauci Maistre, and had the following members: Professor Felice Cremona, Dr. Joseph Borg (later on substituted by Dr. Carmel Testa), Architect André Zammit, Architect Joseph Leone Ganado, and Mr. Edwin Vella.

COMMISSION'S TERMS OF REFERENCE

The terms of reference of the Commission were:

'To prepare a new draft law levying Succession and Donation